Supreme Court, U.S.
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No. 97-390

In The Supreme Court Of The United States

OCTOBER TERM, 1997

HOWARD MORTON HARRIS,
Petitioner

v.

DIANE L. JENSEN
and
BANKERS TRUST COMPANY,
Respondents

Petition for Writ Of Certiori to the
Unites States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

DIANE L. JENSEN,
Counsel of Record
Pavese, Garner, Et. Al.
1833 Hendrey Street
Fort Myers, Florida 33901
(941) 336-6231

ALAN WOODRUFF
Alan P. Woodruff &
Associates, P.A.
5360 Malaluka Court
Cape Coral, Florida 33904
(941) 549-5809

Attorney for Respondent
Diane L. Jensen

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OPINIONS BELOW

Petitioner seeks review of the Eleventh Circuit decision affirming the decision of the District Court for the Middle District of Florida affirming the opinion of summary judgment of the Bankruptcy Court for the Middle District of Florida, *In Re: Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995). These opinions are reprinted in Petitioner's Appendix at pages A1-A36. (For the convenience of the Court, all citations to these opinions will be to the opinions attached as the Appendix to the petition.)

STATEMENT OF THE CASE AND CORRECTION OF MISREPRESENTATIONS

The Eleventh Circuit affirmed, without opinion, the decision of the United States District Court for the Middle District of Florida which had, in turn, affirmed the decision of the Bankrupt Court for the Middle District of Florida in which the Court had held that Petitioner's interest in his profit sharing plan, herein "plan", was not exempt as an "ERISA-qualified" plan under the standard enunciated in *Patterson v. Shumate*, 504 U.S. 753 (1992). Petitioner asserts that these decisions held that:

> "the *Patterson* protection for pension benefits is only available if the pension plan from which the benefits are paid has always been administered in *complete compliance* with Title I of ERISA, 29 U.S.C. §§ 1001-1194, and the Internal Revenue Code." [Petitioner's Brief, page 3 (*Emphasis added*)].

This is not, however, an accurate statement of what the Eleventh Circuit, the District Court or the Bankruptcy Court held[1].

The decision of Eleventh Circuit [Petitioner's Brief Appendix A, A1-2] was entered without an opinion. Therefore, the Eleventh Circuit clearly did not hold as the Petitioner represents. Similarly, the District Court affirmed the decision of the Bankruptcy Court in its entirety without addressing the legal issues presented in the Bankruptcy Court's opinion. [Petitioner's Brief Appendix A, A3-4][2]. Therefore, it is incorrect to say that the District Court held as Petitioner contends. To determine what the Eleventh Circuit was ultimately affirming in its "Affirmed, *Per Curium*" decision it is necessary to go all the way back to the decision of the Bankruptcy Court. [Petitioner's Brief Appendix A, A2-27]

The Bankruptcy Court found two separate grounds for holding that the Petitioner's plan was not "ERISA-qualified" within the meaning of *Patterson v. Shumate*: -

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[1] In Petitioner's statement of the "QUESTION PRESENTED", Petitioner similarly mischaracterizes the decisions below when he attempts to read an "*absolute compliance*" standard into their opinions when no such standard was ever expressed or even implied.

[2] Although the District Court did express particular agreement with a provision of the Bankruptcy Court's opinion relating to the scope of the Bankruptcy Court's powers, the District Court affirmed the decision of the Bankruptcy Court in its entirety without basing its affirmation on any particular proposition.

> First, the Bankruptcy Court recognized that the because Petitioner was the sole shareholder of the plan sponsor the plan was not subject to ERISA as to the Petitioner. [Petitioner's Appendix A, A20-21]
>
> Second, the Bankruptcy Court held that "[w]hile the Bankruptcy Court is not competent to determine whether or not the ERISA-qualification should be revoked or terminated for non-compliance for purposes of the Internal Revenue Code, it is certainly competent to determine whether or not the Plan under consideration is within the holding of *Patterson* and excluded from the Debtor's estate by virtue of [11 U.S.C.] § 541(c)(2)." [Petitioner's Appendix A, A18]

In reaching these conclusions, the Bankruptcy Court specifically stated that:

> In *Patterson v. Shumate* "[t]he Supreme Court did not specify what elements must be established to determine whether or not a Plan is an ERISA-qualified Plan. The term 'ERISA-qualified' is not a term of art and is not defined by the Bankruptcy Code, by the Internal Revenue Code, or by ERISA itself. One must, therefore, determine, based upon the statutory scheme of ERISA and the Internal Revenue Code what type of Profit Sharing plans are ERISA-qualified." [Petitioner's Appendix A, A17]

The Bankruptcy Court then examined the alternative

interpretations of the term "ERISA-qualified" and concluded that it was intended to connotate a plan which includes an anti-alienation provision and (1) is subject to ERISA and (2) is tax qualified under Internal Revenue Code § 401(a). [Petitioner's Appendix A, A18] An discussed *supra*, the Bankruptcy Court addressed *both* the ERISA and the IRC "prongs" of the "ERISA-qualified" test and found that the Petitioner's plan failed *each* prong -- e.g. Petitioner's plan was not subject to ERISA and it was not tax qualified.

Throughout the appeal of this case Petitioner has attempted to create an "straw man" by mischaracterizing the Bankruptcy Court's decision as requiring "complete compliance" with the requirements of ERISA and the Internal Revenue Code. To the contrary, neither the Eleventh Circuit, the District Court or the Bankruptcy Court imposed a "complete compliance" requirement on the "ERISA-qualified" test of *Patterson v. Shumate*. Nonetheless, based on this straw man, Petitioner has argued that because Petitioner *might* have availed himself of remedial procedures established by the Internal Revenue Service to correct the plan's excessive operational violations -- the presence of which the Petitioner has never disputed, the Internal Revenue Service would not necessarily have been disqualified by the Internal Revenue Service. In making these arguments Petitioner has focussed entirely on "qualified" portion of the "ERISA-qualified" test of *Patterson v. Shumate*, and wholly ignored the fact that the Bankruptcy Court's ruling also reflected the fact that the *Petitioner's plan was not subject to ERISA* as to the Petitioner.

Petitioner also contends that the decisions of the

Eleventh Circuit, the District Court and the Bankruptcy Court were based on a finding that the Petitioner's plan failed to comply with all of the operational requirements of ERISA. Although this argument is necessary to create an apparent conflict with the Seventh Circuit's decision in *In Re: Baker*, 114 F.3d 636 (7th Cir. 1997), it is not a correct statement of the controlling factors in the Bankruptcy Court decision. The Bankruptcy Court recognized that the Petitioner's plan was *not subject to ERISA* as to the Petitioner. Therefore, any discussion of the Petitioner's failure to comply with the requirements of ERISA was mere *dicta*.

REASONS FOR DENYING THE PETITION

I.

Eleventh Circuit Decision Does Not Create A Conflict Among The Circuits

As the basis for this Court's jurisdiction, Petitioner relies on the proposition that the Eleventh Circuit's decision creates a conflict among the Circuits. This assertion is without merit.

The Eleventh Circuit's decision, "Affirmed, *Per Curium*", was entered under the Eleventh Circuit's Local Rule 36-1 which is reserved for "an opinion [which] would have no precedential value"[3]. Furthermore, the

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[3] Eleventh Circuit Rule 36-1 provides in relevent part that: "When the court determines that ... (d) a summary judgment, directed verdict or judgment on the pleadings is supported by the record ... *and an opinion would have no precedential value*, the judgment or order may be affirmed

Eleventh Circuit's opinion is unpublished and, pursuant to Local Rule 36-2, unpublished opinions are not considered binding precedent[4]. In as much as the Eleventh Circuit's decision is not even binding precedent within the Eleventh Circuit, it cannot be said that there is a conflict between the Eleventh Circuit and any other Circuit.

Furthermore, even if the Eleventh Circuit's "Affirmed, *Per Curium*", decision were deemed to constitute Eleventh Circuit precedent, there is no basis for finding that a conflict exists with respect to the decision of any other Circuit because the Eleventh Circuit did not state the grounds on which its decision was based. As discussed *infra*, the Bankruptcy Court gave *two separate grounds* for its decision, e.g. first, that the Petitioner's plan was not subject to ERISA, and second, that the Petitioner's willful and egregious misuse and of plan assets in total disregard of the requirements of the Internal Revenue Code caused the plan to fail the "qualified" prong of the "ERISA-qualified" test. Petitioner bases his entire argument on the self-serving conclusion that the Eleventh Circuit's decision was based solely on a finding that Petitioner's plan was not maintained in full compliance with the requirements of

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without an opinion." (*Emphasis added*)

[4] Eleventh Circuit Rule 36-2 provides: "Unpublished Opinion: An opinion shall be unpublished unless a majority of the panel decides to publish it. *Unpublished opinions are not considered binding precedent.* They may be cited as persuasive authority provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made." (*Emphasis added*)

ERISA and the Internal Revenue Code. There is, however, no evidence that this was the basis for the Eleventh Circuit's decision. To the contrary, it is just as reasonable to conclude that the Eleventh Circuit ignored the entire issue of the plan's tax qualification and affirmed the decisions of the Bankruptcy Court and District Court solely on the grounds that the plan was not even subject to ERISA. If this was the basis for the Eleventh Circuit's decision, there would be no conflict between the Eleventh Circuit and any of the authorities relied on by Petitioner. In as much as the Eleventh Circuit chose not to write an opinion in support of its decision, the grounds on which its decision was based will never be known. Under these circumstances it cannot be said that there is a conflict between the decision of the Eleventh Circuit and the decisions of any other Circuit.

Petitioner places particular reliance on a purported conflict between the Eleventh Circuit's decision and *In Re: Baker, supra,* in which the Seventh Circuit's held that failure to administer a plan in full conformity with ERISA does not make ERISA inapplicable. *If* the Bankruptcy Court, the District Court or the Eleventh Circuit had based their holdings solely on failure to comply with the requirements of ERISA, Petitioner's argument might be given credence. However, the decision of the Bankruptcy Court, as affirmed by the District Court and the Eleventh Circuit, was that *the plan was not even subject to ERISA*. Petitioner's attempt to recharacterize the original holding of the Bankruptcy Court solely for the purpose of creating an artificial conflict with the Seventh Circuit must be disregarded.

Finally, Petitioner argues that the Eleventh Circuit's decision is in conflict with this Court's decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) in which this Court found that there was no equitable exception to ERISA's anti-alienation provision. In enunciating the "ERISA-qualified" test of *Patterson*, this Court clearly established a threshhold test for determining whether interests in retirement plan can be protected in bankruptcy. That is, even under *Patterson*, if a plan is not "ERISA-qualified" a debtor's interest in a plan can be an asset of the bankruptcy estate. If, as Petitioner appears to contend, *Guidry* is violated *any time* an interest in a retirement plan is found to be property of a bankruptcy estate, the "ERISA-qualified" standard of *Patterson* would have no significance. This conflict does not exist because an interest in a plan which is not subject to ERISA is not within the scope of *Guidry* and becomes an asset of the bankruptcy estate by virtue of failing the "ERISA-qualified" requirement of *Patterson v. Shumate*.

In this case, the Bankruptcy Court recognized, and the District Court and the Eleventh Circuit agreed, that the Petitioner's plan was not even subject to ERISA. Therefore, there is no conflict between the Eleventh Circuit's decision and *Guidry* because *Guidry* only applies to plans that are subject to ERISA and the Bankruptcy Court, the District Court and the Eleventh Circuit all found that Petitioner's plan is not subject to ERISA.

II.

Decisions Below Are Supported On Grounds Not Opposed In Bankruptcy Court Proceedings

In the proceedings in the Bankruptcy Court the Respondents argued that Petitioner's plan was not subject to ERISA and, therefore, could not be "ERISA-qualified" because the Petitioner was the sole shareholder of the plan sponsor. The Bankruptcy Court found that because 29 C.F.R. § 2510.3-3 disqualifies a sole shareholder from status as an employee or plan participant, and, therefore, the plan was not subject to ERISA as to the Petitioner. *Petitioner did not contest this argument in the proceedings in the Bankruptcy Court.* In Petitioner's appeal to the District Court Petitioner argued, *for the first time*, that a plan could be subject to ERISA even as to a sole shareholder. However, it is well established that a federal appellate court will not generally consider an issue not passed on below. *Singleton v. Wulff*, 428 U.S. 1202, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Therefore, the District Court, sitting as an appellate court with respect to the decision of the Bankruptcy Court, was not required to consider any argument in opposition to the Bankruptcy Court's holding that the plan was not subject to ERISA.

In as much as the decision of the Bankruptcy Court, as affirmed by the District Court and the Eleventh Circuit, was based on adequate grounds apart from those argued by Petitioner as the basis for a review by this Court, any ruling by this Court on the issues raised by Petitioner would be moot and of no significance because the decisions below are adequately supported on grounds which the Petitioner did not

dispute in Bankruptcy Court. Therefore, any decision by this Court would be merely an advisory opinion.

CONCLUSION

Because the decisions of the Bankruptcy Court, as affirmed by the District Court and the Eleventh Circuit, could be properly affirmed on grounds other than the grounds on which Petitioner bases his assertion of a conflict among the Circuits, and because the decision of the Eleventh Circuit -- which does not even constitute precedent within the Eleventh Circuit -- does not clearly conflict with any other decision, review by the Supreme Court is unwarranted and Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted.

DIANE L. JENSEN,
Counsel of Record
Pavese, Garner, Haverfield, Dalton
1833 Hendrey Street
Fort Myers, Florida 33901
(941) 336-6231

Attorney for Respondent
Diane L. Jensen, Trustee

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